

**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission	)	
on its own motion	)	
	)	Docket No. 01-0705
Northern Illinois Gas Company d/b/a NICOR	)	
Gas Company	)	
	)	
Reconciliation of Revenues collected under	)	
Gas Adjustment Charges with Actual Costs	)	
prudently incurred	)	
	)	
Illinois Commerce Commission	)	
on its own motion	)	
	)	Docket No. 02-0067
Northern Illinois Gas Company d/b/a NICOR	)	
Gas Company	)	
	)	
Proceeding to review Rider 4, Gas Cost, pursuant	)	
to Section 9-244(c) of the Public Utilities Act	)	
	)	
Illinois Commerce Commission	)	
on its own motion	)	
	)	Docket No. 02-0725
Northern Illinois Gas Company d/b/a NICOR	)	
Gas Company	)	
	)	
Reconciliation of Revenues collected under	)	
Gas Adjustment Charges with Actual Costs	)	
prudently incurred	)	

**VERIFIED RENEWED MOTION TO COMPEL DISCOVERY  
FROM STAFF OF THE ILLINOIS COMMERCE COMMISSION**

Northern Illinois Gas Company d/b/a Nicor Gas Company (“Nicor Gas” or the “Company”), through its undersigned attorneys, hereby respectfully moves the Administrative Law Judges (the “ALJs”) pursuant to Section 200.370 of the Commission’s Rules of Practice, 83 Ill. Admin. Code § 200.370, for a ruling compelling Staff to respond to the Company’s First Set of Data Requests to Staff (the “Staff Data Requests”).

The Staff Data Requests seek documents and information related to the Gas Cost Performance Program (the “GCPP”) previously operated by Nicor Gas and the Company’s annual purchased gas adjustment (“PGA”) cost reconciliation proceedings as they pertain to the GCPP. These areas of inquiry, in turn, mirror the subject matter of this proceeding on reopening. *See* 220 ILCS 5/9-244; Second Interim Order, p. 6, Docket No. 02-0067 (Ill. Commerce Comm’n, December 17, 2003).

Staff has not disputed the relevance of the areas of inquiry addressed in the Staff Data Requests, which are the mirror image of extensive discovery by Staff on the Company in this proceeding. Rather, Staff has objected and refused to respond to this discovery on the basis that Staff only is required to respond to discovery in this proceeding to the extent the information sought is in the possession of its four (4) chosen testifying witnesses, who are Staff employees, or one other identified Staff employee, who Nicor Gas understands assisted in the preparation of Staff’s witnesses’ direct testimony.

In discussions with Nicor Gas counsel, Staff counsel has provided no legal authority for this arbitrary limitation on the Company’s rights in discovery, and Nicor Gas submits that Staff’s position could not be supported by any good-faith argument for the extension, modification, or reversal of existing law. Illinois law unequivocally defines the scope of discovery *liberally* and in terms of the *issues* in a case. In short, if Staff has in its possession or control relevant documents and information responsive to the Staff Data Requests—which, for whatever reason, are in the possession of Staff employees or agents other than its testifying witnesses and the single other identified Staff employee—then such materials properly are subject to discovery.

Staff’s refusal to respond fully to the Staff Data Requests on the unsupported and improper basis provided directly violates Illinois law, as applied to the Commission, and

threatens the fundamental fairness of this proceeding. Given the material prejudice to Nicor Gas caused by Staff's improper conduct, and the limited time available to the Company in which to prepare its rebuttal case, which is scheduled to be served on the parties on January 16, 2004, Nicor Gas seeks expedited resolution of this Motion.

In further support of this Motion, Nicor Gas states as follows:

1. On August 21, 2003, Nicor Gas served the Staff Data Requests on Staff Counsel.

The Staff Data Requests are attached to this Motion as Exhibit A.<sup>1</sup>

2. The Staff Data Requests can be summarized, as follows:

- Eighteen (18) seek Staff's documents and other information related to specific transactions and issues referenced in the October 28, 2002 Report to the Special Committee of the Board of Directors of Nicor Inc. by independent Counsel Scott R. Lassar. (Ex. A, at NG-ICC 1.02-1.28).
- Nine (9) seek Staff's documents and other information related to the Company's use of the "last-in, first-out" accounting for gas in storage inventory under the GCPP. (Ex. A., at NG-ICC 1.29-1.37).
- Nine (9) seek Staff's documents and other information concerning certain specific Company documents provided to Staff related to the GCPP during the relevant time periods. (Ex. A, at NG-ICC 1.38-1.40, NG-ICC 1.41-1.43, 1.44-1.46).
- Finally, two (2) seek the identity of Staff personnel who reviewed or analyzed Nicor Gas documents related to the Company's 1999-2001 PGA reconciliation proceedings or participated in related audits. (Ex. A, at NG-ICC 1.01, NG-ICC 1.58).

3. On November 26, 2003, pursuant to the direction of the ALJs, Staff served its objections to the Staff Data Requests. Staff's document objecting to the Staff Data Requests is attached hereto as Exhibit B.

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<sup>1</sup> Nicor Gas previously filed a Motion to Compel Discovery in connection with the Staff Data Requests, which was heard on October 29, 2003. The ALJs' rulings at that hearing only addressed the timing of objections and responses to the Staff Data Requests, and similar discovery by the Company on other parties. The ALJs did not reach and expressly reserved any ruling on the merits of the Staff Data Requests. (Tr., at 450-51, Oct. 29, 2003).

4. Staff objected to each of the fifty-eight (58) data requests, to the extent they sought documents or information from Staff employees or their agents, based upon a general objection, which stated, in pertinent part, as follows:

[U]nless otherwise noted, “Staff” is defined as the Staff witnesses assigned to this docket, i.e., Mary Everson, Steve Knepler, Mark Maple, and Richard Zuraksi. In addition, Donald McGuire of the Commission’s Accounting Department will be included in the definition of Staff.

(Ex. B, at 1). Staff repeated this general objection in response to each of the fifty-eight (58) data requests and did not respond fully to the Staff Data Requests over this limitation.

5. Nicor Gas counsel has spoken with Staff counsel on several occasions since receiving Staff’s objections and, on December 5, 2003, Staff’s limited responses to the Staff Data Requests. Company counsel has sought to impress upon Staff counsel that Staff, like any other party, has a good faith obligation to determine which of its employees or agents may have documents or information responsive to the Staff Data Requests and to produce all relevant materials. In response, Staff counsel has stated that Staff has no obligation to respond to discovery in this proceeding unless the information sought is in the possession of its testifying witnesses or Mr. McGuire. Staff counsel has stated that it will not make any further inquiry in response to the Staff Data Requests. As of the filing of this Motion, Nicor Gas has not received a complete response to the Staff Data Requests, despite consultation and reasonable attempts to resolve its differences with Staff. *See* 83 Ill. Admin. Code § 200.350.

6. Staff’s unilateral determination to limit the scope of discovery by the Company in this proceeding to its testifying witnesses and one other Staff employee is unsupported by law and, if not remedied, highly prejudicial to the Company. In proceedings before the Commission, it is the policy that discovery should allow each and every party to obtain full disclosure of all

relevant and material facts. 83 Ill. Admin. Code § 200.340. The Commission's Rules neither contemplate nor permit the kind of arbitrary limitation which Staff seeks to impose in this proceeding, and the ALJs should not endorse Staff's improper attempt to limit its obligations and its inquiry in response to discovery in this manner.

7. The Illinois courts repeatedly have emphasized that "[t]he purposes of litigation are best served when each party knows as much about the controversy as is reasonably practicable." *Mistler v. Mancini*, 111 Ill. App. 3d 228, 231-32, 443 N.E.2d 1125, 1128 (1st Dist. 1983) (restating Illinois discovery policy in affirming trial court's ruling to deny motion to quash discovery subpoena); accord *Carlson v. General Motors Corp.*, 9 Ill. App. 3d 606, 619-20, 289 N.E.2d 439, 449-50 (1st Dist. 1972) (reversing judgment and ordering new trial where defendant failed to disclose relevant facts). Thus, the objectives of discovery are to enhance the truth-seeking process, making the parties' good faith compliance desirable and necessary; to enable attorneys to better prepare and evaluate their cases; to eliminate surprise as a litigation tactic, so that a determination will rest on the merits, rather than upon legal maneuvering by counsel; and to promote the expeditious resolution of disputes. *Mistler*, 111 Ill. App. 3d 228, 231-32, 443 N.E.2d 1125, 1128 (citations omitted). The procedures available for discovery are intended to be flexible and adaptable, and to unduly limit their scope would frustrate the efficient and expeditious administration of justice. *Id.* (citing *Monier v. Chamberlain*, 35 Ill. 2d 351, 357, 221 N.E.2d 410, 415 (1966)).

8. Under Illinois law, the concept of relevance for purposes of discovery is broad and presupposes a range of materials including not only what is admissible at trial but also that which is reasonably calculated to lead to the discovery of admissible matter at trial. *Bauter v. Reding*, 68 Ill. App. 3d 171, 175, 385 N.E.2d 886, 890 (3d Dist. 1979) (upholding contempt order against defendant insurance carrier for its refusal to produce its entire claim file related to

the litigation); *see, e.g., Krupp v. Chicago Transit Auth.*, 8 Ill. 2d 37, 41, 132 N.E.2d 532, 535 (1956). Importantly, relevance in discovery is determined by reference to the issues presented in a given case or, as stated by the Illinois Appellate Court, “something is relevant if it tends to prove or disprove something in issue.” *Bauter*, 68 Ill. App. 3d at 175, 385 N.E.2d at 890. *Accord Pemberton v. Tieman*, 117 Ill. App. 3d 502, 505, 453 N.E.2d 802, 804 (1st Dist. 1983).

9. Critically, the need for full and open discovery in the courts and at the administrative level is the same, and an agency, as a party to an administrative proceeding, is required to disclose all evidence in its possession “which *might* be helpful to an accused.” *Montgomery v. Dep’t of Registration & Educ.*, 146 Ill. App. 3d 222, 224-26, 496 N.E.2d 1100, 1102-03 (1st Dist. 1986) (*original emphasis*) (reversing agency’s license revocation where agency refused to divulge the contents of its files to licensee); *see McCabe v. Dep’t of Registration & Educ.*, 90 Ill. App. 3d 1125, 413 N.E.2d 1353 (1st Dist. 1980); *Wegmann v. Dep’t of Registration & Educ.*, 61 Ill. App. 3d 352, 377 N.E.2d 1297 (1st Dist. 1978). The requirement for an agency to divulge relevant information in its files to a party whose interests may be adversely affected by the agency’s actions is rooted in fundamental principles of fairness and due process. *Montgomery*, 146 Ill. App. 3d at 224-26, 496 N.E.2d at 1102-03. Accordingly, while an agency possesses broad discretion in conducting its hearings, which includes the supervision of discovery, that discretion must be exercised “judicially and not arbitrarily.”<sup>2</sup> *Id.*

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<sup>2</sup> This same concept is well-established in the criminal context. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963) (holding that prosecution’s suppression of evidence favorable to the accused upon request, which is material to guilt or punishment, violates due process).

10. Based on the foregoing authority, Staff's attempt to restrict the Company's access to relevant information in its files through a unilateral limitation on the scope of discovery is unlawful. As an initial matter, the ALJs must reject the definition of "Staff" imposed by Staff for purposes of limiting discovery in this proceeding, which is wholly arbitrary. The Commission's Rules adopted for purposes of its proceedings, including this docket, expressly define "Staff" and "Commission Staff" to mean "individuals employed by the Commission."<sup>3</sup> 83 Ill. Admin. Code § 200.40. Accordingly, Staff cannot impose an "unofficial" version of this definition in this proceeding solely for purposes of limiting the scope of discovery by the Company and Staff's obligations to respond to the same.

11. More pointedly, the documents and information sought in the Staff Data Requests relate specifically to the GCPP and the Company's associated PGA proceedings and, thus, are directly relevant to the issues in this proceeding. The Company is entitled to obtain and review such materials, and Staff must make a reasonable internal inquiry as to the information sought and produce all relevant and responsive materials in its possession or control. The failure of such a requirement would call into question the fundamental fairness of this process—in particular, whether the Company arbitrarily has been denied the opportunity to obtain all available relevant information in support of its case or in rebuttal of the case put on by Staff.<sup>4</sup> Such a failure also would call into question the validity of the Commission's ultimate findings of fact and conclusions. *See Montgomery*, 146 Ill. App. 3d at 224-26, 496 N.E.2d at 1102-03; *see also Drehle v. Fleming*, 49 Ill. 2d 293, 297-98, 274 N.E.2d 53, 55-56 (1971) (ordering new trial based on party's nondisclosure of relevant information in discovery).

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<sup>3</sup> This definition expressly excludes ALJs from the definition of Staff. 83 Ill. Admin. Code § 200.40.

<sup>4</sup> Nicor Gas notes that the "fundamental demands of due process of law" have been held sufficient to require the President of the United States to release documents in his files. *U.S. v. Nixon*, 418 U.S. 683, 713, 94 S. Ct. 3090, 3110 (1974). Certainly, such a requirement should apply to Staff of the Commission.

12. Nicor Gas further notes that Staff on behalf of its witnesses has pre-filed its direct case in this proceeding which contains testimony relating to the issues addressed in the Staff Data Requests. Based on its witnesses' opinions, Staff is seeking refunds from Nicor Gas associated with the GCPP and the Company's PGA proceedings in the approximate amount of \$102 million. While the factual and legal basis for these proposed refunds is unclear, at best, it is clear that certain of Staff's witnesses, in support of the proposed refunds, are offering their opinions that Staff as a whole purportedly did not have access to or the chance to consider certain documents and/or information which the Company allegedly possessed during or prior to the Order in Commission Docket No. 99-0127 authorizing the GCPP. While Staff's affirmative case does not establish the scope of relevancy in this or any other proceeding, it is essential as a matter of law that the Company be able to test in discovery the validity of the opinions offered by Staff's witnesses, including any basis for such opinions. (*See* discussion *supra*).

13. Furthermore, Staff counsel previously has characterized Staff's role in this proceeding as the "investigator" of Nicor Gas. (*See* Staff. Resp. to Mot. to Compel Discovery, at 2, Oct. 28, 2003). As the "investigated" party (at least in Staff's view), Nicor Gas cannot be subject to Staff's proposed arbitrary limitation on the Company's pre-hearing inquiry into the issues presented for resolution. *See, e.g., Wardius v. Oregon*, 412 U.S. 470, 475-76, 93 S. Ct. 2208, 2212-13 (1973) ("[D]iscovery must be a two-way street.").

14. Finally, the inquiry presented to Staff in responding appropriately to the Staff Data Requests is not burdensome. Staff has a limited number of employees and operates in a limited number of offices. Staff counsel is or should be well aware of which of the Staff's employees or agents are likely to have information responsive to the Staff Data Requests. Staff has an obligation as a party to make a reasonable inquiry of these persons and into their files in response to the Staff Data Requests and to produce all relevant and responsive materials. Since



discovery resumed in this matter last year, Nicor Gas has responded to no fewer than thirty (30) sets of data requests from Staff, consisting of literally hundreds of questions and document demands. At Staff's request, Nicor Gas further agreed to and facilitated the depositions of thirteen (13) current and former Company employees, including all managers and senior executives with responsibility for the GCPP. Given the enormous burden and expense in discovery shouldered by Nicor Gas, Staff should not be allowed to reciprocate by summarily declining to cooperate fully.

WHEREFORE, for all these reasons, Nicor Gas respectfully requests a ruling requiring Staff to respond to the Staff Data Requests in full, and without the arbitrary limitation on the definition of "Staff" contained in its general objection to the Staff Data Requests, no later than January 9, 2004, and providing such other relief as is just and appropriate. Nicor Gas seeks expedited resolution of this Motion. Because the issues raised are limited and the legal authority is clear, Nicor Gas is not requesting a hearing on this Motion, which the Company submits may be resolved on the briefs filed.

Dated: December 23, 2003

Respectfully submitted,

NORTHERN ILLINOIS GAS COMPANY  
D/BA/ NICOR GAS COMPANY

By: \_\_\_\_\_  
One of its attorneys

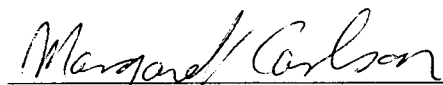
John E. Rooney  
Thomas A. Andreoli  
Sonnenschein Nath & Rosenthal  
233 South Wacker Drive  
Chicago, Illinois 60606  
(312) 876-8000  
jrooney@sonnenschein.com  
tandreoli@sonnenschein.com

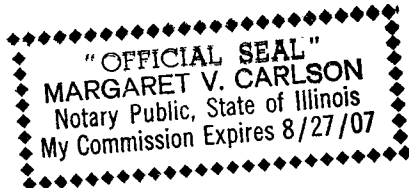
**VERIFICATION**

I, Thomas A. Andreoli, being first duly sworn, depose and state that I am an attorney at Sonnenschein Nath & Rosenthal LLP and one of the attorneys for Northern Illinois Gas Company d/b/a Nicor Gas in Consol. Docket Nos. 01-0705, 02-0067, 02-0725, that I have read Nicor Gas's Verified Renewed Motion to Compel Discovery from Staff of the Illinois Commerce Commission and know the contents thereof, and that the statements contained therein are true and correct to the best of my knowledge, information, and belief.

  
\_\_\_\_\_  
Thomas A. Andreoli

Subscribed and sworn to before me  
this 23th day of December 2003

  
\_\_\_\_\_  
Notary Public



**CERTIFICATE OF SERVICE**

I, Thomas A. Andreoli, hereby certify that I served a copy of Northern Illinois Gas Company d/b/a Nicor Gas's Verified Renewed Motion to Compel Discovery from Staff Of the Illinois Commerce Commission upon the service list in consolidated Docket Nos. 01-0705/02-0067/02-0725 by email on December 23, 2003.

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Thomas A. Andreoli